

2013 DRAFTING REQUEST

Bill

Received: **12/6/2012** Received By: **tdodge**
Wanted: **As time permits** Same as LRB:
For: **Administration-Budget 267-7980** By/Representing: **Iwata**
May Contact: Drafter: **tdodge**
Subject: **Medical Assistance** Addl. Drafters:
Extra Copies:

Submit via email: **YES**
Requester's email:
Carbon copy (CC) to: **tamara.dodge@legis.wisconsin.gov**
pam.kahler@legis.wisconsin.gov

Pre Topic:

DOA:.....Iwata, BB0289 -

Topic:

Alter divestment provisions to prevent individuals with sufficient financial means from being eligible for Medical Assistance

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	tdodge 12/27/2012	kfollett 1/2/2013	jmurphy 1/3/2013	_____			
/P1	tdodge 1/20/2013	kfollett 1/21/2013	jmurphy 1/21/2013	_____	sbasford 1/3/2013		
/1	tdodge			_____	sbasford		State

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
	2/1/2013			_____	1/21/2013		
/2		kfollett 2/1/2013	jfrantze 2/3/2013	_____	sbasford 2/3/2013		State

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12/5/13
2/1/13
2/3/13

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					1/21/2013		

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See attached

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/?	tdodge	1/1/12	1/2/12	1/3/12			

FE Sent For:

<END>

Dodge, Tamara

From: Hanaman, Cathlene
Sent: Thursday, December 06, 2012 8:57 AM
To: Dodge, Tamara; Kahler, Pam
Subject: FW: Statutory Language Drafting Request - BB0289
Attachments: 13-15 Divestment Statutory Language.doc; Divestment Attachment 2 - Examples.docx; Divestment Attachment 3 - Drafting Instructions.docx

From: Yuko.Iwata@wisconsin.gov [<mailto:Yuko.Iwata@wisconsin.gov>]
Sent: Wednesday, December 05, 2012 4:21 PM
To: Hanaman, Cathlene
Cc: Thornton, Scott - DOA; Gauger, Michelle C - DOA; Iwata, Yuko - DOA
Subject: Statutory Language Drafting Request - BB0289

Biennial Budget: 2013-15

Topic: Asset Divestment and Medicaid Eligibility

Tracking Code: BB0289

SBO Team: HSI

SBO Analyst: Iwata, Yuko - DOA
Phone: (608) 267-7980
E-mail: Yuko.Iwata@wisconsin.gov

Agency Acronym: DHS

Agency Number: 435

Priority: High

Intent:

To tighten divestment policy to prevent individuals with sufficient financial means from being eligible for Medicaid.

Attachments: True

Please send completed drafts to statlanguage@wisapps.wi.gov

Divestment

Decision Needed

Should the State seek statutory changes to prevent individuals from divesting assets in order to qualify for Medicaid?

Background

1. Divestment is defined as giving away one's resources for less than fair market value in order to become eligible for Medicaid. Divestment rules apply to elderly, blind, and disabled individuals applying for Medicaid, as this eligibility category has an asset limit. If an applicant has divested assets during a specified "look back period," he or she will be subject to a "divestment penalty period." The look back period is 60 months.
2. Federal law currently requires states to implement policies aimed at preventing individuals from divesting assets in order to qualify for long-term care services under Medicaid. Wisconsin's divestment policy was updated effective January 2009 to incorporate changes outlined in the federal Deficit Reduction Act of 2005. However, there continue to be numerous "loopholes" through which individuals can divest personal assets. When divestment occurs, individuals avoid using their own resources, instead relying on public resources to pay for their health and long-term care needs.
3. The Department proposes statutory changes to tighten divestment policy and limit eligibility to those who truly need financial assistance. The proposed changes are listed below. Attachment 1 compares the proposed changes to current divestment policy and explains the rationale for the change.
 - Provide no penalty period reductions for partial refunds;
 - Revise the penalty start date for Medicaid recipients;
 - Deny eligibility if the community spouse refuses to sign the application;
 - Consider insincere promissory notes divestment;
 - Apply divestment policy to exempt assets;
 - Apply divestment policy to certain spousal transfers;
 - Expand the asset verification system;
 - Provide for limited transfer of non-income producing assets; and
 - Count the cash value of life insurance policies to extent the combined cash value exceeds \$1,500.

4. Attachment 2 illustrates examples of loopholes in current divestment policy.

Current Language

1. Current divestment statutes are under Wis. Stat. § 49.453. The Department's proposal would also affect several other Medicaid statutes under Chapter 49.

Proposed Change

1. Attachment 3 provides drafting instructions enumerating the current statutory language and proposed changes.

Desired Effective Date:

Agency: DHS
Agency Contact: Lara Rosen
Phone: 266-5655

Attachment 2. Divestment Examples

Promissory Notes to Heirs as Divestment*

Loopholes in divestment policy pertaining to Promissory Notes allowed one couple with over \$1 million in assets to become eligible for Medicaid. When Jerry first applied for Medicaid, he and his wife Martha were found to have assets over \$900,000, not counting exempt assets such as Jerry's 401K. Nine months later, the couple was determined to be under the asset limit after "loaning" \$720,000 to a daughter and creating a corresponding Promissory Note with a repayment period of 12 months at \$60,000 per month. The Note was created in accordance with divestment policy, and while the loan was made from jointly-held funds, the Note specified that repayments were to go to Martha only.

In this case, Martha would have all funds returned in 12 months, while at the same time the institutionalized spouse would remain eligible for Medicaid. The \$720,000 "loan" could cover private pay nursing home care for up to about 10 years. Ten years of nursing home care for one individual would be expected to cost the State approximately \$500,000.

Life Insurance Riders as Assets for Eligibility*

Marianne bought a single premium whole life policy from Phoenix for about \$100,000. The death benefit was \$1,000, but the policy contained a rider that would pay her son and daughter each \$50,000 upon his death. Because the Department only looks at a policy's cash value when the death benefit is over \$1,500, the Department did not consider the policy an asset and Marianne was deemed eligible for Medicaid. The \$100,000 she sheltered could have covered over a year of private pay nursing home care.

The Department expects cases like this to increase, as Phoenix has recently begun promoting life insurance products specifically geared toward sheltering assets for Medicaid planning purposes. The brochure can be found [here](#).

Spousal Refusal*

More and more, institutionalized spouses are transferring assets to community spouses who refuse to sign the Medicaid application. Call Center staff indicate that they receive about 3-4 calls about these types of cases per month. In such situations, current policy requires the Department to process the application as if the applicant were a single individual, counting only the applicant's assets. For example, Fred was in a nursing home and applying for Medicaid. He transferred \$600,000 to his wife, Bonnie, who refused to sign the application. Interspousal transfers are not considered divestment, so Fred was able to maintain eligibility while Bonnie was able to keep \$600,000, over five times the maximum Community Spousal Resource Allowance of \$113,640. If the Department could deny eligibility if a spouse refuses to sign the application, Fred would have been able to cover at least 6 years of private pay nursing home care using his own resources.

Divestment Penalty Start Date*

Current policy states the begin date for a penalty period for a divestment by a recipient is the first day of the month the divestment occurred. However, the penalty is not effective until after the Department gives timely notice to the recipient, which generally takes at least a month. This means that the recipient can give away \$6,554 monthly (the divestment amount that would result in a one-month penalty period) without losing eligibility. As the following example demonstrates, recipients can use this provision to shelter a much greater amount of assets.

Example 1

George created a trust to which he “loaned” \$200,000 with a Promissory Note that complied with divestment policy. He was therefore determined eligible for Medicaid. The Promissory Note paid him back \$5,000 per month beginning in April, which he then transferred to his children.

In this circumstance, the penalty period for the first \$5,000 payment he received would have begun on April 1 and ended before the end of the month. However, he would not have received timely notice until May if not June. For each month of repayment, the penalty period would have ended before timely notice could be given, therefore allowing George to maintain continual Medicaid eligibility. If the penalty period start date for recipients were revised to the first of the month after timely notice is given, however, George would have had a continual penalty period for divestment.

**Note: The above examples are all based on real cases, though some details have been changed to ensure HIPPA compliance.*

Attachment 3. Divestment Drafting Instructions

No Penalty Period Reductions for Partial Refunds

Wis. Stat. 49.453(8)

Create a provision to clarify that a penalty period shall not apply only if all divested assets have been returned in order to pay for the individuals care.

This change is consistent with Sec. 1917(c)(2)(C)(iii) of the SSA

“An individual shall not be ineligible for medical assistance by reason of [divestment] to the extent that a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that all assets transferred for less than fair market value have been returned to the individual”

Such a clarification might be modeled after Minnesota Statutes Ch. 256B.0595(2)(f)

“A period of ineligibility established here may be eliminated if all of the assets transferred for less than fair market value used to calculate the period of ineligibility, or cash equal to the value of the assets at the time of the transfer, are returned. A period of ineligibility must not be adjusted if less than the full amount of the transferred assets or the full cash value of the transferred assets are returned.”

Revision of Penalty Start Date for Recipients

Wis. Stat. 49.453(3)

Amend Wis Stat. 49.453(3)(a)2 to clarify that the statute applies only to applicants for, and not to recipients of, Medical Assistance.

Create a similar provision applicable to individuals receiving medical assistance payment of long term care services at the time of divestment, except that the penalty period shall begin on the first day of the month following advance notice of the penalty period.

This is consistent with federal law that states that the penalty period should begin "the month during *or after* which assets have been transferred." Sec. 1917(c)(1)(D)(ii)

In Minnesota, this language is interpreted as the month after advance notice is given. Minnesota Statutes Ch. 256B.0595 Subd.2(c)(1)

“for uncompensated transfers by or on behalf of individuals receiving medical assistance payment of long-term care services, begins the first day of the month following advance notice of the period of ineligibility...”

Spousal Refusal to Sign the Application

Wis. Stat. 49.455(5)

Create a provision to deny eligibility to an institutionalized spouse unless both spouses provide income and resources information and sign the Medicaid application.

See Illinois Public Act 97-0689, the Save Medicaid Access and Resources Together (SMART) Act.

“In determining the income and resources assets available to the institutionalized spouse and to the community spouse, the Department of Healthcare and Family Services shall follow the procedures established by federal law. If an institutionalized spouse or community spouse refuses to comply with the requirements of Title XIX of the federal Social Security Act and the regulations duly promulgated thereunder by failing to provide the total value of assets, including income and resources, to the extent either the institutionalized spouse or community spouse has an ownership interest in them pursuant to 42 U.S.C. 1396r-5, such refusal may result in the institutionalized spouse being denied eligibility and continuing to remain ineligible for the medical assistance program based on failure to cooperate.”

Insincere Promissory Notes

Wis. Stat. 49.453(4c)

Create a provision that provides that a promissory note is considered cancelled upon the death of the lender when the debtor is the presumptive heir or where neither party has any incentive to enforce repayment. The goal is to ensure that only promissory notes that are truly arms' length are permitted under the statute. A note that states it is cancelled upon the death of a lender is currently considered a divestment; a note that is effectively cancelled upon death should be similarly treated.

Apply Divestment Policy to Exempt Assets

Wis. Stat. 49.453(2)

Create a provision that will apply divestment policy to the transfer of exempt assets as well as the transfer of non-exempt assets.

See Michigan's Medicaid Policy Manual: PEM 405

“Resource means all the client's and his spouse's assets and income. It includes all assets and all income, even countable and/or excluded assets...”

Spousal Divestment

Wis. Stat. 49.455(5)(d)

Amend this provision to state that a divestment penalty will apply to the institutionalized spouse if the institutionalized spouse or community spouse transfers assets during the first five years of eligibility of the institutionalized spouse. This is to make clear that 49.453(2) also applies to spousal impoverishment cases.

Though we would like to look back for the first five years versus Michigan's policy of one year, see Michigan's Manual BEM 402 (bottom of p.4 of 12)

"When the presumed asset eligible period ends, use BEM 400 to determine the client's asset eligibility. Count only the client's assets, not the spouse's assets to determine continued eligibility. Verify all assets which are still owned by the individual, by the spouse, and jointly owned. *Verify the transfers of all assets which were owned at the IAA but which are no longer owned. Review all transfers for divestment.*" (italics added)

Asset Verification System (AVS) Expansion

Wis. Stat. 49.45(4m), and related

Expand the definition of "Financial Institution" in Wis. Stat. 49.45(4m)(a)(3) and in Wis. Stat. 224.42(1)(a) to include institutions that serve as brokers of life insurance policies, mutual funds, and investment accounts.

The definition given in Wis. Stat. 49.853(1)(c) may be appropriate:

(c) "Financial institution" means any of the following:

1. A depository institution, as defined in 12 USC 1813 (c).
2. An institution-affiliated party, as defined in 12 USC 1813 (u), of a depository institution under subd. 1.
3. A federal credit union or state credit union, as defined in 12 USC 1752.
4. An institution-affiliated party, as defined in 12 USC 1786 (r), of a credit union under subd. 3.
5. A benefit association, insurance company, safe deposit company, money market mutual fund or similar entity authorized to do business in this state.
6. A broker-dealer, as defined in s. 551.102 (4).

Non-Income Producing Transfers

Wis. Stat. 49.455(8)(d)

Amend the statute to provide that the amount of resources needed to meet the minimum monthly maintenance needs allowance (MMMNA) will be based on the cost of a single premium lifetime annuity that pays monthly amounts that, combined with other available income, raises the community spouse's income to the MMMNA level. Any resource (income generating or not) may be transferred

in an amount that, combined with the community spouse resource allowance calculated prior to hearing, provides the community spouse with sufficient funds to purchase the annuity. The community spouse is not required to purchase the annuity. See 441 Iowa Administrative Code Ch. 75 for the fair hearing process:

“75.5(3) Attribution of resources to institutionalized spouse and community spouse

e. Notice and appeal rights. The department shall provide each spouse a notice of the attribution results. The notice shall state that either spouse has a right to appeal the attribution if the spouse believes:

- (1) That the attribution is incorrect, or
- (2) That the amount of income generated by the resources attributed to the community spouse is inadequate to raise the community spouse's income to the minimum monthly maintenance allowance. If an attribution has not previously been appealed, either spouse may appeal the attribution upon the denial of an application for Medicaid benefits based on the attribution.

f. Appeals. Hearings on attribution decisions shall be governed by procedures in 441—Chapter 7. If the hearing establishes that the community spouse's resource allowance is inadequate to raise the community spouse's income to the minimum monthly maintenance allowance, there shall be substituted an amount adequate to provide the minimum monthly maintenance needs allowance.

- (1) To establish that the resource allowance is inadequate and receive a substituted allowance, the applicant must provide verification of all the income of the community spouse. For an applicant who became an institutionalized spouse on or after February 8, 2006, all income of the institutionalized spouse that could be made available to the community spouse pursuant to 75.16(2) “d” shall be treated as countable income of the community spouse when the attribution decision was made on or after February 8, 2006.

- (2) The amount of resources adequate to provide the community spouse minimum maintenance needs allowance shall be based on the cost of a single premium lifetime annuity with monthly payments equal to the difference between the monthly maintenance needs allowance and other countable income not generated by either spouse's countable resources.

- (3) The resources necessary to provide the minimum maintenance needs allowance shall be based on the maintenance needs allowance as provided by these rules at the time of the filing of the appeal.

- (4) To receive the substituted allowance, the applicant shall be required to obtain one estimate of the cost of the annuity.

- (5) The estimated cost of an annuity shall be substituted for the amount of resources attributed to the community spouse when the amount of resources previously determined is less than the estimated cost of an annuity. If the amount of resources previously attributed for the community spouse is greater than the estimated cost of an annuity, there

shall be no substitution for the cost of the annuity, and the attribution will remain as previously determined.

(6) The applicant shall not be required to purchase this annuity as a condition of Medicaid eligibility.”

Life Insurance Policies

Wis. Stat. 49.47(4)(b)(2w)

Modify this statute to count the cash value of life insurance policies to the extent the combined cash value of all life insurance policies exceeds \$1,500.

See New Hampshire Revised Annotated Statutes 167:4 IV(c)

“Notwithstanding any provision of law to the contrary, for purposes of medicaid eligibility, investment in life insurance policies with cash surrender value in excess of \$1,500 shall be limited to policies that ensure payment to the state of New Hampshire of all the proceeds of the policy in excess of amounts spent on burial up to the total of medicaid expenditures made on behalf of the individual.”



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-0749(?)

TJD: [signature] P1
RmNR

In: 12/27/12

DOA:.....Iwata, BB0289 – Alter divestment provisions to prevent individuals with sufficient financial means from being eligible for Medical Assistance

FOR 2013-2015 BUDGET — NOT READY FOR INTRODUCTION

PWF
Jan 12/13

Do Not Gen

1 **AN ACT**...; relating to: the budget.

Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

change
component

SECTION 1. 49.45 (4m) (a) 3. of the statutes is (amended to read:

renumbered 49.45 (4m)
(a) 3.
(intro.)
and

49.45 (4m) (a) 3. (intro.) "Financial institution" has the meaning given in 12 USC 3401

(1). means any of the following:

History: 1971 c. 40 s. 93; 1971 c. 42, 125; 1971 c. 213 s. 5; 1971 c. 215, 217, 307; 1973 c. 62, 90, 147; 1973 c. 333 ss. 106g, 106h, 106j, 201w; 1975 c. 39; 1975 c. 223 s. 28; 1975 c. 224 ss. 54h, 56 to 59m; 1975 c. 383 s. 4; 1975 c. 411; 1977 c. 29, 418; 1979 c. 34 ss. 837f to 838, 2102 (20) (a); 1979 c. 102, 177, 221, 355; 1981 c. 20 ss. 839 to 854, 2202 (20) (c); 1981 c. 93, 317; 1983 a. 27 ss. 1046 to 1062m, 2200 (42); 1983 a. 245, 447, 527; 1985 a. 29 ss. 1026m to 1031d, 3200 (23), (56), 3202 (27); 1985 a. 120, 176, 269; 1985 a. 332 ss. 91, 251 (5), 253; 1985 a. 340; 1987 a. 27 ss. 989r to 1000s, 2247, 3202 (24); 1987 a. 186, 307, 339, 399; 1987 a. 403 s. 256; 1987 a. 413; 1989 a. 6; 1989 a. 31 ss. 1402 to 1452g, 2909i; 1989 a. 107, 173, 310, 336, 351, 359; 1991 a. 22, 39, 80, 250, 269, 315, 316; 1993 a. 16 ss. 1362g to 1403, 3883; 1993 a. 27, 107,

112, 183, 212, 246, 269, 335, 356, 437, 446, 469; 1995 a. 20; 1995 a. 27 ss. 2947 to 3002r; 7299, 9126 (19), 9130 (4), 9145 (1); 1995 a. 191, 216, 225, 289, 303, 398, 417, 457; 1997 a. 3, 13, 27, 114, 175, 191, 237, 252, 293; 1999 a. 9, 63, 103, 180, 185, 2001 a. 13, 16, 35, 38, 57, 67, 104, 109, 2003 a. 33, 318, 321; 2005 a. 22; 2005 a. 25 ss. 1120 to 1149f, 2503 to 2510; 2005 a. 107, 165, 253, 254, 264, 301, 340, 386, 441; 2007 a. 20 ss. 1513 to 1559h, 9121 (6) (a); 2007 a. 90, 97, 104, 141, 153; 2009 a. 2, 28, 113, 177, 180, 190, 221, 334, 342; 2011 a. 10, 32, 120, 126, 158, 192, 209, 258; 2011 a. 260 s. 81; s. 13.92 (1) (bm) 2.

1 **SECTION 2.** 49.45 (4m) (a) 3. a. to f. of the statutes are created to read:

2 49.45 (4m) (a) 3. a. A depository institution, as defined in 12 USC 1813 (c).

3 b. An institution-affiliated party, as defined in 12 USC 1813 (u), of a depository
4 institution under subd. 3. a.

5 c. A federal credit union, as defined in 12 USC 1752, or state credit union, as
6 defined in 12 USC 1752.

****NOTE: I am unsure whether this definition includes all credit unions if that is your intent. I wonder whether additional terms like "state-chartered credit union" should also be added.

7 d. An institution-affiliated party, as defined in 12 USC 1786 (r), of a credit
8 union under subd. 3. c.

9 e. A benefit association, insurance company, safe deposit company, money
10 market mutual fund, or similar entity authorized to do business in this state.

11 f. A broker-dealer, as defined in s. 551.102 (4).

12 **SECTION 3.** 49.453 (2) (a) (intro.) of the statutes is amended to read:

13 49.453 (2) (a) *Institutionalized individuals.* (intro.) Except as provided in sub.
14 (8), if an institutionalized individual or his or her spouse, or another person acting
15 on behalf of the institutionalized individual or his or her spouse, transfers assets,
16 regardless of whether those assets are exempt under 42 USC 1396p, for less than fair
17 market value on or after the institutionalized individual's look-back date, the
18 institutionalized individual is ineligible for medical assistance for the following
19 services for the period specified under sub. (3):

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 183; 2007 a. 20.

****NOTE: Please confirm that the underscored language is sufficient to comply with the request.

20 **SECTION 4.** 49.453 (2) (b) (intro.) of the statutes is amended to read:

1 49.453 (2) (b) *Noninstitutionalized individuals*. (intro.) Except as provided in
2 sub. (8), if a noninstitutionalized individual or his or her spouse, or another person
3 acting on behalf of the noninstitutionalized individual or his or her spouse, transfers
4 assets, ^{of} ~~regardless whether those assets are exempt under 42 USC 1396p~~, for less
5 than fair market value on or after the noninstitutionalized individual's look-back
6 date, the noninstitutionalized individual is ineligible for medical assistance for the
7 following services for the period specified under sub. (3):

~~History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185; 2007 a. 20.~~

****NOTE: Please confirm that the underscored language is sufficient to comply
with the request.

8 **SECTION 5.** 49.453 (3) (a) (intro.) of the statutes is amended to read:

9 49.453 (3) (a) (intro.) The period of ineligibility under this subsection begins
10 on either of the following for an applicant for Medical Assistance:

~~History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185; 2007 a. 20.~~

11 **SECTION 6.** 49.453 (3) (ag) of the statutes is created to read:

12 49.453 (3) (ag) The period of ineligibility under this subsection for a transfer
13 of assets made at the time the individual is receiving long-term care services through
14 Medical Assistance begins on the first day of the month following the month in which
15 the individual receives advance notice of the period of ineligibility.

16 **SECTION 7.** 49.453 (4c) (c) of the statutes is created to read:

17 49.453 (4c) (c) A promissory note in which the debtor is a presumptive heir of

18 the ^{lender} ~~lender~~ or in which neither the lender nor debtor has any incentive to enforce

19 repayment is considered cancelled upon the death of the ^{lender} ~~lender~~ for purposes of this

20 section.

****NOTE: Instead of considering the note "cancelled upon the death of the lender,"
would it be more direct to consider the note a "transfer of assets for less than fair market
value?"

21 **SECTION 8.** 49.453 (8) (a) 3. of the statutes is created to read:

1 49.453 (8) (a) 3. All of the assets transferred for less than fair market value,
2 or cash equal to the value of the assets transferred for less than fair market value,
3 are returned to the individual. Subsections (2) and (3) apply if only part of the assets
4 transferred for less than fair market value, or cash equal to only part of the value of
5 the assets transferred for less than fair market value, are returned to the individual.

6 **SECTION 9.** 49.455 (5) (title) of the statutes is amended to read:

7 49.455 (5) (title) RULES FOR TREATMENT OF RESOURCES; INELIGIBILITY.

8 ~~History: 1989 a. 31, 81; 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27; 2005 a. 441.~~

8 **SECTION 10.** 49.455 (5) (d) of the statutes is amended to read:

9 49.455 (5) (d) During a continuous period of institutionalization, after an
10 institutionalized spouse is determined to be eligible for medical assistance, no
11 resources of the community spouse are considered to be available to the
12 institutionalized spouse, except that a transfer of those resources or other assets by
13 the institutionalized spouse or community spouse within the first 5 years of
14 eligibility of the institutionalized spouse may result in a period of ineligibility under
15 s. 49.453 (2) and (3).

16 ~~History: 1989 a. 31, 81; 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27; 2005 a. 441.~~

16 **SECTION 11.** 49.455 (5) (e) of the statutes is created to read:

17 49.455 (5) (e) The department may deny to the institutionalized spouse
18 eligibility for Medical Assistance if, when requested by the department, the
19 institutionalized spouse and the community spouse do not provide the total value of
20 their assets and information on income and resources to the extent required under
21 federal Medicaid law or sign the application for Medical Assistance.

22 **SECTION 12.** 49.455 (8) (d) of the statutes is renumbered 49.455 (8) (d) 1. and
23 amended to read:

1 49.455 (8) (d) 1. If either spouse establishes at a fair hearing that the
2 community spouse resource allowance determined under sub. (6) (b) 1. to 2. or 4.
3 without a fair hearing does not generate enough income to raise the community
4 spouse's income to the minimum monthly maintenance needs allowance under sub.
5 (4) (c), the department shall establish, under subd. 2., an amount to be used under
6 sub. (6) (b) 3. that results in a community spouse resource allowance that generates
7 enough income to raise the community spouse's income to the minimum monthly
8 maintenance needs allowance under sub. (4) (c). 3. Except in exceptional cases
9 which would result in financial duress for the community spouse, the department
10 may not establish an amount to be used under sub. (6) (b) 3. unless the
11 institutionalized spouse makes available to the community spouse the maximum
12 monthly income allowance permitted under sub. (4) (b) or, if the institutionalized
13 spouse does not have sufficient income to make available to the community spouse
14 the maximum monthly income allowance permitted under sub. (4) (b), unless the
15 institutionalized spouse makes all of his or her income, except for an amount equal
16 to the sum of the personal needs allowance under sub. (4) (a) 1. and any family
17 allowances under sub. (4) (a) 3. paid by the institutionalized spouse and the amount
18 incurred as expenses for medical or remedial care for the institutionalized spouse
19 under sub. (4) (a) 4., available to the community spouse as a community spouse
20 monthly income allowance under sub. (4) (b).

History: 1989 a. 31, 81; 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27; 2005 a. 441.

****NOTE: Please note that I retained all of the information in the current section 49.455 (8) (d), though I have divided the paragraph into subdivisions to add the new provisions in the middle. Please advise if you want any of the existing language changed or eliminated.

21 **SECTION 13.** 49.455 (8) (d) 2. of the statutes is created to read:

49.455 (8) (d) 2. The department shall base the amount to be used under sub.
 (6) (b) 3. on the cost of a single premium lifetime annuity that pays monthly amounts
 that, combined with other available income, raises the community spouse's income
 to the minimum monthly maintenance needs allowance. Any resource, regardless
 whether the resource generates income, may be transferred in an amount that,
 combined with the community spouse resource allowance calculated before the fair
 hearing, provides the community spouse with sufficient funds to purchase the
 annuity. The community spouse is not required to purchase an annuity to obtain this
 amount.

****NOTE: Did you want any additional provisions from the Iowa Administrative
 Code included?

SECTION 14. 49.47 (4) (b) 2w. of the statutes is amended to read:

49.47 (4) (b) 2w. For a person who is eligible under par. (a) 3. or 4., life insurance
 with cash surrender values if the total face combined cash value of all life insurance
 policies is not more than \$1,500.

History: 1971 c. 125; 1971 c. 213 s. 5; 1971 c. 215; 1973 c. 90, 147, 333; 1977 c. 29 ss. 593, 1656 (18); 1977 c. 105 s. 59; 1977 c. 273, 418; 1979 c. 34; 1981 c. 20, 93; 1981 c. 314 s. 144; 1983 a. 27, 245; 1985 a. 29; 1987 a. 27, 307, 399, 413; 1989 a. 9; 1989 a. 31 ss. 1462k to 1466d, 2909c to 2909i; 1989 a. 173, 336, 351; 1991 a. 39, 178, 269, 316; 1993 a. 16, 269, 277, 437; 1995 a. 27 ss. 3026 to 3028, 9126 (19); 1995 a. 225, 289, 295; 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 25, 253; 2007 a. 11, a. 20 ss. 1596 to 1604, 9121 (6) (a); 2009 a. 28, 180; 2011 a. 10, 32.

****NOTE: I substituted combined cash value for total face value. Instead, did you
 want to retain the face value limit and add the same limit for combined cash value?

SECTION 15. 224.42 (1) (a) of the statutes is amended to read:

224.42 (1) (a) "Financial institution" has the meaning given in ~~12 USC 3401~~
 (1) s. 49.45 (4m) (a) 3.

History: 2011 a. 192.

****NOTE: Would all of the provisions in this draft apply only to transfers of assets
 and other events occurring on the effective date of the provisions? If so, or if you intend
 the provisions to also apply to transfers occurring for a specified time in the past, this draft
 should contain an initial applicability provision to clarify and give notice to which
 transfers these provisions apply to. Please contact me to discuss options for an initial
 applicability provision.

(END)

DOA:.....lwata, BB0289 - Alter divestment provisions to prevent individuals with sufficient financial means from being eligible for Medical Assistance

FOR 2013-2015 BUDGET — NOT READY FOR INTRODUCTION

1 **AN ACT ...; relating to: the budget.**

**Analysis by the Legislative Reference Bureau
HEALTH AND HUMAN SERVICES MEDICAL
ASSISTANCE**

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 **SECTION 1.** 49.45 (4m) (a) 3. of the statutes is renumbered 49.45 (4m) (a) 3.
3 (intro.) and amended to read:

4 49.45 (4m) (a) 3. (intro.) "Financial institution" ~~has the meaning given in 12~~
5 ~~USC 3401 (1).~~ means any of the following:

6 **SECTION 2.** 49.45 (4m) (a) 3. a. to f. of the statutes are created to read:

1 49.45 (4m) (a) 3. a. A depository institution, as defined in 12 USC 1813 (c).

2 b. An institution-affiliated party, as defined in 12 USC 1813 (u), of a depository
3 institution under subd. 3. a.

4 c. A federal credit union, as defined in 12 USC 1752, or state credit union, as
5 defined in 12 USC 1752.

****NOTE: I am unsure whether this definition includes all credit unions if that is
your intent. I wonder whether additional terms like "state-chartered credit union"
should also be added.

6 d. An institution-affiliated party, as defined in 12 USC 1786 (r), of a credit
7 union under subd. 3. c.

8 e. A benefit association, insurance company, safe deposit company, money
9 market mutual fund, or similar entity authorized to do business in this state.

10 f. A broker-dealer, as defined in s. 551.102 (4).

11 SECTION 3. 49.453 (2) (a) (intro.) of the statutes is amended to read:

12 49.453 (2) (a) Institutionalized individuals. (intro.) Except as provided in sub.
13 (8), if an institutionalized individual or his or her spouse, or another person acting
14 on behalf of the institutionalized individual or his or her spouse, transfers assets,
15 regardless of whether those assets are exempt-excluded under 42 USC 1396p, if
retained for less than fair

16 market value on or after the institutionalized individual's look-back date, the
17 institutionalized individual is ineligible for medical assistance for the following
18 services for the period specified under sub. (3):

****NOTE: Please confirm that the underscored language is sufficient to comply
with the request.

19 SECTION 4. 49.453 (2) (b) (intro.) of the statutes is amended to read:

20 49.453 (2) (b) Noninstitutionalized individuals. (intro.) Except as provided in
21 sub. (8), if a noninstitutionalized individual or his or her spouse, or another person
22 acting on behalf of the noninstitutionalized individual or his or her spouse, transfers

Comment [SF/FM1]: DHS believes the language as proposed is adequate since 12 USC 1752 (8) specifies that "state credit union" and "state-chartered credit union" have identical meanings, and the definition is the one used in the similar child support and revenue programs. However, if the drafter is concerned, it could be added.

Comment [SF/FM2]: OLC suggests the slight modification above

1 ~~assets, regardless of whether those assets are exempt-excluded under 42 USC~~
 ~~1396p, if retained for less~~

2 than fair market value on or after the noninstitutionalized individual's look-back
3 date, the noninstitutionalized individual is ineligible for medical assistance for the
4 following services for the period specified under sub. (3):

~~****NOTE: Please confirm that the underscored language is sufficient to comply~~
 ~~with the request.~~

Comment [SF/FM3]: See previous comment

5 **SECTION 5.** 49.453 (3) (a) (intro.) of the statutes is amended to read:

6 49.453 (3) (a) (intro.) The period of ineligibility under this subsection begins
7 on either of the following for an applicant for Medical Assistance:

8 **SECTION 6.** 49.453 (3) (ag) of the statutes is created to read:

9 49.453 (3) (ag) The period of ineligibility under this subsection for a transfer
10 of assets made at the time the individual is receiving long-term care services through
11 Medical Assistance begins on the first day of the month following the month in which
12 the individual receives advance notice of the period of ineligibility.

13 **SECTION 7.** 49.453 (4c) (c) of the statutes is created to read:

14 49.453 (4c) (c) A promissory note in which the debtor is a presumptive heir of
15 the lender or in which neither the lender nor debtor has any incentive to enforce
16 repayment is considered cancelled upon the death of the lender for purposes of this
17 section.

~~****NOTE: Instead of considering the note "cancelled upon the death of the lender,"~~
 ~~would it be more direct to consider the note a "transfer of assets for less than fair market~~
 ~~value"?~~

Comment [SF/FM4]: BEPS thinks this section is appropriate as proposed. The alternative suggested in the note goes further than the agreed-upon approach. If after this change we continue to see promissory note provisions exploited by Medicaid planners, this alternative might merit discussion.

18 ~~**SECTION 8.** 49.453 (8) (a) 3. of the statutes is created to read:~~

19 ~~49.453 (8) (a) 3. All of the assets transferred for less than fair market value,~~

20 ~~or cash equal to the value of the assets transferred for less than fair market~~
21 ~~value,~~

21 ~~are returned to the individual. Subsections (2) and (3) apply if only part of the~~
 ~~assets~~

1 ~~transferred for less than fair market value, or cash equal to only part of the~~
2 ~~value of~~

3 ~~the assets transferred for less than fair market value, are returned to the~~
4 ~~individual.~~

5 SECTION 9. 49.455 (5) (title) of the statutes is amended to read:

6 49.455 (5) (title) RULES FOR TREATMENT OF RESOURCES; INELIGIBILITY.

7 SECTION 10. 49.455 (5) (d) of the statutes is amended to read:

8 49.455 (5) (d) During a continuous period of institutionalization, after an
9 institutionalized spouse is determined to be eligible for medical assistance, no
10 resources of the community spouse are considered to be available to the
11 institutionalized spouse, except that a transfer of those resources or other assets by
12 the institutionalized spouse or community spouse within the first 5 years of
13 eligibility of the institutionalized spouse may result in a period of ineligibility under
14 s. 49.453 (2) and (3) for the institutionalized spouse.

15 SECTION 11. 49.455 (5) (e) of the statutes is created to read:

16 49.455 (5) (e) The department may deny to the institutionalized spouse
17 eligibility for Medical Assistance if, when requested by the department, the
18 institutionalized spouse and the community spouse do not provide the total value of
19 their assets and information on income and resources to the extent required under
20 federal Medicaid law or sign the application for Medical Assistance.

21 SECTION 12. 49.455 (8) (d) of the statutes is renumbered 49.455 (8) (d) 1. and
22 amended to read:

23 49.455 (8) (d) 1. If either spouse establishes at a fair hearing that the
24 community spouse resource allowance determined under sub. (6) (b) 1. to 2. or 4.
25 without a fair hearing does not generate enough income to raise the community
spouse's income to the minimum monthly maintenance needs allowance under sub.
(4) (c), the department shall establish, under subd. 2., an amount to be used under

Comment [RLK5]: The original version of the bill under the language, it would be argued that returning some assets could allow to determine the amount of assets if some different number would know, apply, apply to (6) (b) DHS wants to ensure that nothing is spent to the benefit of the spouse, all assets are returned.

In fact, on the language, we suggest that 49.455 (5) (d) is amended to read:
The assets are exempt under 42 USC 1396p (c) (2) (A), (B), or (C). All of the assets transferred for less than fair market value, or cash equal to the value of the assets transferred for less than fair market value, must be returned for 42 USC 1396p (d) (2) (C) to apply and to be eligible for eligibility under subd. (6) (b).

Comment [SF/FM6]: If the I.S. did it, we'd already catch this.

1 sub. (6) (b) 3. that results in a community spouse resource allowance that generates
2 enough income to raise the community spouse's income to the minimum monthly
3 maintenance needs allowance under sub. (4) (c).

4 3. Except in exceptional cases which would result in financial duress for the
5 community spouse, the department may not establish an amount to be used under
6 sub. (6) (b) 3. unless the institutionalized spouse makes available to the community
7 spouse the maximum monthly income allowance permitted under sub. (4) (b) or, if
8 the institutionalized spouse does not have sufficient income to make available to the
9 community spouse the maximum monthly income allowance permitted under sub.
10 (4) (b), unless the institutionalized spouse makes all of his or her income, except for
11 an amount equal to the sum of the personal needs allowance under sub. (4) (a) 1. and
12 any family allowances under sub. (4) (a) 3. paid by the institutionalized spouse and
13 the amount incurred as expenses for medical or remedial care for the
14 institutionalized spouse under sub. (4) (a) 4., available to the community spouse as
15 a community spouse monthly income allowance under sub. (4) (b).

-----NOTE: Please note that I retained all of the information in the current section
49.455 (8) (d), though I have divided the paragraph into subdivisions to add the new
provisions in the middle. Please advise if you want any of the existing language changed
or eliminated.

16 **SECTION 13.** 49.455 (8) (d) 2. of the statutes is created to read:

17 49.455 (8) (d) 2. The department shall base the amount to be used under sub.
18 (6) (b) 3. on the cost of a single premium lifetime annuity that pays monthly amounts
19 that, combined with other available income, raises the community spouse's income
20 to the minimum monthly maintenance needs allowance. Any resource, regardless
21 of whether the resource generates income, may be transferred in an amount that,
22 combined with the community spouse resource allowance calculated before the fair
23 hearing, provides the community spouse with sufficient funds to purchase the

Comment [SF/FM7]: BEPS does not object to
the new format. We see no need to further change
any existing language.

annuity. The community spouse is not required to purchase an annuity to obtain this amount.

****NOTE: Did you want any additional provisions from the Iowa Administrative Code included?

SECTION 14. 49.47 (4) (b) 2w. of the statutes is amended to read:

49.47 (4) (b) 2w. For a person who is eligible under par. (a) 3. or 4., life insurance with cash surrender values if the ~~total face~~ combined cash surrender value of all life insurance policies is not more than \$1,500, including riders and other attachments.

****NOTE: I substituted combined cash value for total face value. Instead, did you want to retain the face value limit and add the same limit for combined cash value?

SECTION 15. 224.42 (1) (a) of the statutes is amended to read:

224.42 (1) (a) "Financial institution" has the meaning given in 42-USC-3404 (4) s. 49.45 (4m) (a) 3.

****NOTE: Would all of the provisions in this draft apply only to transfers of assets and other events occurring on the effective date of the provisions? If so, or if you intend the provisions to also apply to transfers occurring for a specified time in the past, this draft should contain an initial applicability provision to clarify and give notice to which transfers these provisions apply to. Please contact me to discuss options for an initial applicability provision.

(END)

Comment [SF/FM8]: BEPS is satisfied with this provision as proposed

Comment [RLK9]: See suggested changes above.

Comment [RLK10]: We suggest that these policies should be effective as of 7/1/13, and applied on or after that date to applicants. The policies will not be used to redetermine existing eligibility, but will be applied to the look-back period for applicants, as our look-back period remains 5 years. This means, for example, that an applicant who gave away their Bantley last year would either have to get it back or face a penalty period. The effective date would apply to residents to the extent that the penalty period calculation has changed for them.

One caveat is that the Dept. may not be able to put in place the asset verification system expansion by July - would that be problematic under an effective date of July 1, 2013?

Dodge, Tamara

From: Iwata, Yuko - DOA <Yuko.Iwata@wisconsin.gov>
Sent: Monday, January 14, 2013 2:42 PM
To: Dodge, Tamara
Subject: FW: FW: LRB-0749

Hi Tami,

Please see DHS' response to your questions.

Thanks,

Yuko Iwata
Executive Policy and Budget Analyst
Division of Executive Budget and Finance
Department of Administration
(608) 267 – 7980

From: Rosen, Lara K - DHS
Sent: Monday, January 14, 2013 1:38 PM
To: Iwata, Yuko - DOA
Cc: Gauger, Michelle C - DOA; Cunningham, Curtis J - DHS; Auchue, Linda M - DHS; Smith, Shawn - DHS; Fox, Sabrina - DHS; Miller, Fratney L - DHS; Malofsky, Shelley F - DHS; Forsaith, Andrew C - DHS; Megna, Richard H - DHS
Subject: RE: FW: LRB-0749

Hi Yuko,

Please see responses to Tami's questions in blue below.

Thanks,
Lara

From: Dodge, Tamara [<mailto:Tamara.Dodge@legis.wisconsin.gov>]
Sent: Thursday, January 10, 2013 4:18 PM
To: Iwata, Yuko - DOA
Subject: LRB-0749

Yuko,

I have questions about some of the comments made by DHS on LRB-0749 regarding divestment.

On page 2, Section 3 and page 3, Section 4 of the draft:

Removing all of the extra phrases from the s. 49.453 (2) (a) and (b) (intro.), it says the following under current law before any alterations: "If an institutionalized individual...transfers assets for less than fair market value on or after the institutionalized individual's look-back date, the institutionalized individual is ineligible..."

The change DHS makes to change exempt to excluded is fine. But the additional phrase "if retained" would make the provision read: "If an institutionalized individual...transfers assets **if retained** for less than fair market value on or after the institutionalized individual's look-back date, the institutionalized individual is ineligible...." The assets are being transferred here and not retained so I don't understand what the phrase "if retained" means here.

The comma should be after 'if retained' instead of preceding it so that it refers to the excluded asset, not if retained is a divestment. The point is that assets include those that would be exempt while the individual held on to it, but once it is transferred it loses that exemption. Both places should be changed to read:

Except as provided in sub.

- 13 (8), if an institutionalized individual or his or her spouse, or another person acting
14 on behalf of the institutionalized individual or his or her spouse, transfers assets,
15 regardless of whether those assets are excluded under 42 USC 1396p; if retained, for less than fair
16 market value on or after the institutionalized individual's look-back date, the
17 institutionalized individual is ineligible for medical assistance for the following
18 services for the period specified under sub. (3):

On page 4, Section 10:

The original request from DHS said that a divestment penalty will apply if the "institutionalized spouse or community spouse transfers assets." The comments now seem to indicate that "institutionalized spouse" should be removed. Please clarify whether institutionalized spouse should be removed from the language added to s. 49.455 (5) (d). (I have is no problem adding "for the institutionalized spouse" to the end of the sentence.)

We struck institutionalized spouse because this provision refers to the community spouse's assets so presumably the IS does not control them once s/he is eligible, plus general divestment law is clear that transfer by an IS would affect the IS's benefits and it must be disclosed to the agency.

BEPS met to discuss the language and thought it was best to strike "institutionalized spouse or" from the first part of the language added to s. 49.455 (5)(d). So, Atty Dodge does correctly understand our intent here.

I think the other changes I can make, or at least take a shot at, in a redraft without clarification.

Tamara J. Dodge

Attorney

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